No. 15627

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TORRANCE NATIONAL BANK, a national banking association,

Appellant,

vs.

THE AETNA CASUALTY & SURETY COMPANY, a corporation,

Appellee.

APPELLEE'S BRIEF.

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Statement of Pleadings and Facts Disclosing Jurisdiction.

Although this matter was originally filed by the Appellant in the Superior Court of the State of California, in and for the County of Los Angeles, it was transferred to the District Court of the United States on the ground of diversity of citizenship, with over $3,000 involved. Appellant is a citizen of California and Appellee is a citizen of Connecticut.

The case was tried on the issues presented by the Amended Complaint, to which an Amendment had been filed, and to which Answer was made by Appellee.

Judgment having been duly rendered and entered in favor of Appellee, the Appellant has taken this Appeal,

after first having moved the Court to reopen and reargue the law applicable to the case. Appellant's Motion was denied.

Statement of the Case.

Although the Appellant's Statement of the Case is generally satisfactory to Appellee, there are certain additional matters to which Appellee will herein refer. In so doing, undoubtedly some of the ground already covered in Appellant's Statement of the Case will be gone over again. However, this Statement by Appellee will cover only the important points, none of the lesser details.

Joseph R. Alden was at all times material to this lawsuit, the Secretary-Treasurer, as well as the General Manager, of an organization known as Enesco Federal Credit Union. As such, he was duly authorized to sign checks for and on behalf of the Enesco Federal Credit Union. [R. 5.]

The Enesco Federal Credit Union maintained a checking account with the Appellant. Alden also maintained a personal bank account with the Appellant Bank under the name of *"Enesco Service Fund."* [R. 6.] He had established this other account to assist him in the operation of his personal business, which consisted of cashing checks for the employees of National Supply Company and writing utility money orders for them. [R. 6 and 8.]

Over a period of several years, long prior to the transaction over which this litigation developed, Alden had built up a procedure by which he would present to the Appel-

lant bank an Enesco Federal Credit Union check, signed by him as Treasurer. The check would be dated as of Friday. It would be given to the bank on Thursday, during business hours. He would pick up the money which represented the amount for which the check was written after the close of business on Thursday. [R. 9 and 75.] He would use this money to cash National Supply Company payroll checks on Friday. He would deposit these checks to his personal Enesco Service Fund Account. After making this deposit, a debit in the amount of $30,000 (or whatever the amount of the check was) would be made on the Enesco Service Fund Account, in favor of the Appellant bank. [R. 9, 17 and 42.]

Years earlier, he had arrived at the point where the amount that he wished to withdraw from the Enesco Federal Credit Union Account exceeded the amount that was generally on deposit in that account. [R. 12 and 17.] Both the President and the Executive Vice-President of the Appellant bank were informed, in advance, of this system which Alden employed, and, as a matter of fact, a charge was made by the bank for each of these weekly transactions. [R. 18 and 19.] The amount charged went up as the amount which Alden withdrew increased. [R. 19 and 20.] The amount of this charge was actually paid from funds in the *Enesco Service Fund* account. [R. 20.] Alden told these same bank officials that the funds were being used for his own check-cashing business, and that this business was not connected with the Enesco Federal Credit Union. [R. 21.] Each time that he in-

creased the amount that he wanted to withdraw for his check-cashing operations, he would, of necessity, discuss the matter with one or both of these officials and secure their approval of the increase. [R. 22 and 23.]

As a part of this procedure or system, after sufficient money had been deposited in the Enesco Service Fund account to cover the amount of the check that had been presented the day before, the bank would return that check to Alden. [R. 24 and 25.] In this manner, of course, the checks would never reflect on the bank's records, nor would they reflect in any of the bank's statements on the Enesco Federal Credit Union account. The Enesco Federal Credit Union checks which Alden used in connection with this practice were unnumbered. [R. 25.] Generally, these checks would be redeemed on Friday, but sometimes they would be redeemed on Saturday, back in the days when the bank was open on Saturdays. [R. 42.]

The particular check which forms the subject of this lawsuit was dated April 3, and had been taken to the bank by Mr. Alden on Thursday, April 2. He withdrew $30,000 upon leaving the check with the bank. He was thereafter robbed of the money. [R. 11.] This particular check was, of course, "cashed" pursuant to the procedure that is above described. It will be noted from an examination of the check itself, which is in evidence, that the bank stamp indicates that the check was paid on April 4, 1953, indicating, of course, that the check was not processed through the usual bank operations until two days after it had first been presented to the bank.

Some time thereafter litigation developed between the bank and the Enesco Federal Credit Union, and the bank having lost, it has not recovered the $30,000. (See *Torrance National Bank v. Enesco Federal Credit Union,* 134 Cal. App. 2d 360.)

The bank has sued its bonding company in this litigation contending that this particular check dated April 3, 1953, was in fact a forgery. There is no question but that Alden had the authority to sign checks for and on behalf of Enesco Federal Credit Union. [See Pltf. Ex. 1, which was introduced into evidence by Plaintiff itself.] It is the position of Appellant, and it is actually the only issue involved in this appeal, that this check was a forgery because Alden intended to apply the funds gained from "cashing" the check to purposes which were beyond his authority as an official of the Enesco Federal Credit Union.

Another issue is, regardless of whether the check itself would otherwise be a forgery, did Alden have the necessary intent to defraud? The trial court, as may be seen from reading its Memorandum Opinion, based its decision on the former issue and held that there was no forgery, since Alden had the authority to sign checks for and on behalf of Enesco Federal Credit Union.

ARGUMENT.

A. Summary of Appellee's Position.

The bond in question permits the bank to recover from the bonding company any loss occasioned by cashing or paying forged checks or through the establishment of credit based upon forged checks. Appellant argues, on pages 24 and 25 of its Brief, that any uncertainty in the meaning of the bond should be resolved against the bonding company. Since Appellant cites no portion of the bond's language, which it contends to be ambiguous or uncertain, Appellee submits that it cannot possibly argue this point. There is no contention of Appellant which Appellee can meet. Therefore, all that Appellee will do in this Brief is to state that the portion of Appellant's Brief devoted to this issue is purposeless, and therefore Appellee will make no effort to refute it.

To consider the basic issue, it is Appellee's position that the check dated April 3, 1953 is not a forgery, because it was signed by Alden as Secretary-Treasurer of the Enesco Federal Credit Union, which office Alden in fact held at the time; and further, as such official, he was specifically authorized to sign checks for that organization. Put another way, there can be no forgery *in this state* where a check is signed by one with authority to sign it, even though he does misapply the funds gained through securing payment of the check.

Secondly, Appellee contends that, in any event, there was no intent to defraud, which is a necessary element of any forgery, and is specifically included in the definition of forgery as contained in Section 470 of the California Penal Code.

B. There Was No Forgery Because Alden Was Authorized to Sign Checks for His Principal.

Counsel for Appellant makes much of the change that was made in Penal Code Section 470. It is his contention that the case of *People v. Bendit,* 111 Cal. 274, is no longer the law because of this change. In saying this, he entirely ignores the fact that *People v. Bendit* was quoted with approval in the very recent case of *Pasadena Investment Co. v. Peerless Casualty Co.,* 132 Cal. App. 2d 328. Equally damaging to the Appellant's contention is the fact that the language added to this code section specifically states that signing *another's* name *without having authority to sign that other's name* is a forgery. In other words, the phraseology which was added to the code section clarifies that code section so that it is impossible for it to take on any other meaning than that which is contended by Appellee. In the following partial quotation from Penal Code Section 470 the significant portion which was added is italicized so that its applicability to the issue under discussion may be clear.

> "Every person who, with intent to defraud, *signs the name of another person, . . . knowing that he has no authority so to do,* to, or falsely makes, alters, forges, or counterfeits, any . . . check, . . . or request for the payment of money, . . . is guilty of a forgery."

It will be noted by reference to the Appendix in Appellant's Opening Brief that, even prior to 1905, it was a forgery to falsely make, alter, forge, or counterfeit a check. The important addition to the code section, for our purpose, was the plain and simple provision that the signing of the name of *another* person, without authority to sign his name, was also specifically included in the

code definition of forgery. Actually, it is just as likely, if not far more likely, that the purpose of the addition to the code section was to clarify it so that it specifically set forth the rule which was propounded in the case of *People v. Bendit, supra.* The wording of the added language certainly suggests that this was the intent, rather than, as Appellant argues, to make the signing of one's own name a forgery. Why else would the framers of this addition to the code section use the word "another," when they said that the signing of the "name of another person" without authority, is a forgery?

Having concluded the argument and reasons why the change in Penal Code Section 470 made no change in the rule stated in *People v. Bendit, supra,* it is undoubtedly proper at this point to set forth what that case holds. Perhaps the best way to do that is to quote from the very recent case, previously cited, of *Pasadena Investment Co. v. Peerless Casualty Co.,* at page 331. From this quotation, it will be immediately seen that the situation in the *Bendit* case is almost precisely the same as that which is involved in this litigation.

> ". . . In *People v. Bendit,* 111 Cal. 274 [43 P. 901, 52 Am. St. Rep. 186, 31 L. R. A. 831], without authority, defendant collected an account owed by one company to another and receipted for the cash by writing the company name with his own thereunder. At page 276, the court said:
>
> " 'It is quite clear that the facts above stated do not constitute forgery. When the crime is charged to be the false making of a writing, there must be the making of a writing which *purports to be the writing of another.* The falsity must be in the writing itself—in the manuscript. A false statement of fact in the body of the instrument, *or a false as-*

> *sertion of authority to write another's name, or to sign his name as agent, by which a person is deceived and defrauded, is not forgery. There must be a design to pass as the genuine writing of another person that which is not the writing of such other person.* The instrument must fraudulently purport to be what it is not.'" (Last emphasis added.)

The *Peerless Casualty* case itself is likewise in point. This case, applying the *Bendit* decision, holds, at page 331:

> "The invoices and receipts, alleged by the complaint in the instant action to have been forged, appear from the other allegations of the complaint to have been made by the parties purporting to have made them. They are not forgeries. . . ."

To apply this same rule to the present litigation, it is necessary to hold that there has been no forgery, since the document was signed by the individual purporting to have signed it.

The distinction which Appellee is making, that there is a difference between the signing of an instrument where the one signing has authority to sign, although he may have no authority to take the funds so acquired, and the situation where one signs another's name without any authority to do so, is one which is well recognized by the authorities in California. In the former situation, there is an unauthorized act by the signer in that he may take the funds for purposes other than that which his principal intended, but there is no forgery. In the latter situation, however, there is a forgery, because there never was any authority to sign another's name.

Appellant, in its Brief, relies on California authorities which are either not in point or are misinterpreted by Appellant. Appellant cites *People v. Rushing,* 130 Cal.

450, and quotes from it at some length on pages 17 and 18 of its Brief. What Appellant fails to express, however, is that the *Rushing* case finds a forgery to have been committed because, in a legal sense, the one signing the power of attorney was not actually signing his own name. In that case, the power of attorney was signed "E. Geddes." Although the one signing it was, in fact, named *Elmer* Geddes, the defendant had used the instrument to cash a check which had been drawn in favor of another "E. Geddes," whose name was in fact *Edwin* Geddes. Since the defendant Rushing had no power of attorney from the E. Geddes who was intended as the drawee of the check, Rushing, in fact, had no authority to sign the name "E. Geddes" on any papers relating to *Edwin* Geddes. The law has always been in accord with the *Rushing* case, or at least it has been for centuries, and it is improper to assert that the *Rushing* case indicates any departure from the view and opinion set forth in the *Bendit* case.

Appellant also relies on *People v. McKenna,* 11 Cal. 2d 327. This decision likewise fails to support its position. Appellant seems to rely particularly on the language at the bottom of page 332. On that page the court states that "the crime of forgery consists either in the false making or alteration of a document." This decision adds absolutely nothing to the Appellant's argument, since the "false making or alteration of a document" was a forgery even prior to the change made in Section 470. Incidentally, in the *McKenna* case, the defendant had apparently created a completely false photostatic copy of a document which had never even existed. This had been produced by photographing several different writings and then, apparently, putting them together through some method of "trick photography." Also the defen-

dant had added extremely important phraseology to a document after it had been signed by another. In other words, the defendant had falsely made a document, and had also altered a document.

The case of *Kiekoefer v. U. S. National Bank,* 2 Cal. 2d 98, is relied on by Appellant, although, again, without justification. At page 108, the court says:

> ". . . *As Palmer had the legal right to sign plaintiff's name to said endorsement, his act in so doing was, of course, not a forgery.* Forgery is defined as the signing by a person of another's name knowing that he has no authority so to do. (Pen. Code, sec. 470.) Palmer could not know that he had no such authority when he in fact had such authority." (Italics added.)

Obviously, the "such authority" referred to is the authority to sign the other's name. In the instant litigation, Alden had the authority to sign the other's name, or, to put it more correctly, he had the authority to sign for his principal It is the authority to *sign* another's name with which the cases are concerned in determining whether or not a forgery has been committed. They are not concerned with whether or not the particular act of the signer was beyond the scope of his authority as an agent, so long as he did have the authority to sign the other's name. It is confusion on this point which has led the Appellant to its improper contentions and erroneous conclusions.

Another California case relied on by Appellant is *People v. Caldwell,* 55 Cal. App. 2d 238. In certain respects this opinion is not as clear as it might be. In the first place, it appears that the defendant was convicted of both

forgery and five different counts of grand theft. At page 244, the court states:

> "The fact of forgery was established by the testimony of Mr. Williams that he did not sign his own name to the certificate or to the endorsement and that he authorized no one to do so."

This would appear to be the decision of the court with respect to the question of forgery, and it is, of course, clearly in line with the position taken by this Appellee in this instant litigation. Later discussions in the case would appear to be *dicta* and, in any event, may relate to the accusations of grand theft, rather than to the accusation of forgery. Therefore, it is submitted that there is nothing in the *Caldwell* case which actually supports the position of Appellant.

People v. McPherson, 6 Cal. App. 266, is also cited by Appellant in its Brief. Appellant seems to rely particularly on language at page 269, in which the court states that the information is not defective, even though one cannot tell from reading it whether the charge is for forging a fictitious deed or signing the name of James Wallace to the deed. Since forging a fictitious deed would constitute "falsely making," that would, of course be within Section 470 of the Penal Code, as would the signing of another's name by the defendant. It is difficult to determine why the Appellant has bothered to cite this case. It is submitted that the case would not in any way support the Appellant's position.

Perhaps one last California case should be discussed. It is *Torrance National Bank v. Enesco Federal Credit Union, supra.* In that case, the court, at page 328, held that the defendant was not obliged to help the bank recoup its $30,000 loss, or any part of it, which resulted

after Mr. Alden had been robbed. *That case does not hold that there was a forgery.* It specifically states that the *transaction* was *unauthorized,* and it adds, "The fact that any check in an amount less than or up to the amount of the deposit would have been authorized does not alter the fact that the check involved in the instant case was unauthorized." That court apparently had in mind the distinction which has been reiterated throughout this Brief, namely, that there is a difference between an unauthorized check or transaction and an unauthorized signature or signing. *In view of the language just quoted from that case, if the court in the instant litigation were to find that a forgery had been committed, then it would be espousing the untenable position that, whether or not a forgery existed would depend upon whether or not there were sufficient funds on deposit in the account to cover the check.*

C. There Was No Attempt to Defraud, and Therefore, There Was No Forgery.

As previously stated, Penal Code Section 470 states that "intent to defraud" is a necessary element of the crime of forgery. (See also *People v. Meldrum,* 2 Cal. 2d 52.) Without belaboring the point, it is undoubtedly true that Alden lacked intent to defraud the bank. The entire past practice which had been built up over a period of several years indicated that he had every intention of seeing that the bank got back the $30,000 that it was paying to him. The bank knew the purpose for which he intended to use the funds and was, in fact, extending credit to him for that purpose. This presents a second reason why there could be no forgery in this case. Incidentally, Appellant has stated in its Brief that there was no evidence that the bank knew the purpose for which

Alden was using the funds which it supplied to him. This is an inaccurate statement, since there was specific, unrefuted testimony by Alden that he told them that he was using the funds for his own personal check-cashing business. [R. 21.]

Conclusion.

Appellee submits that the decision of the trial court in the instant case was entirely correct, and, actually, the only decision which it could properly have rendered. The facts clearly establish that there was no forgery, since Alden had full and complete authority to sign checks on behalf of his principal. At most, the transaction constituted an unauthorized act on the part of Alden. He was not signing *another's* name without authority so to do. In addition, Alden had no intent to defraud, and therefore, no forgery was committed.

Respectfully submitted,

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